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No. 90-924

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In the Supreme Court of the United States

OCTOBER TERM, 1990

GUADALUPE RAMOS, PETITIONER

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in concluding that respondent failed to show that his employer discriminated against him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is unreported, but the judgment is noted at 915 F.2d 692 (Table). The decision of the district court (Pet. App. A13-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. The petition for a writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an Hispanic male employee of the Internal Revenue Service (IRS) at Austin, Texas, was twice

denied promotion from a position at a GS-12 salary level to one at a GS-13 level. Pet. App. A6-A7, A15-A16. On both occasions, the IRS ultimately selected a white male. On August 13, 1987, after exhausting his administrative remedies, petitioner filed suit in the United States District Court for the Western District of Texas alleging that the IRS discriminated against him on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. App. A2, A16.[1]

After a bench trial, the district court rejected all of petitioner's claims and entered judgment in favor of the IRS. As to petitioner's first failure to obtain promotion, in October 1981, the court determined that petitioner "was not placed on the 'Best Qualified List' * * * because his numerical evaluation was too low," and concluded that petitioner's rating "accurately evaluated [his] performance" and that "[t]here is no evidence of any racial discrimination in this instance." Pet. App. A17. Although petitioner made the "Best Qualified List" on his second attempt at promotion in September 1982, the district court determined that "[t]he selected individual had a broader range of experience for the position than did [petitioner]. There is no evidence of racial discrimination in this instance." *Id.* at A18.[2] In general, the court rejected the argument that "the national origin of [petitioner] * * * [was a] factor[] in the actions or inactions regarding [him]," *id.* at A20-A21, concluding instead that "there is no evidence, direct or circumstantial, to substantiate discrimination," *id.* at A25, and that peti-

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[1] In addition to challenging the two promotion decisions, petitioner also alleged several instances of retaliatory conduct based on prior complaints of discrimination. Petitioner did not raise his retaliation claims in the court of appeals, Pet. App. A3, and they are not now in issue.

[2] The court also rejected petitioner's retaliation claims.

tioner "failed to show by a preponderance of the evidence that he was discriminated against." *Ibid.*

2. In the court of appeals petitioner argued that "an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations." Pet. App. A8. In an unpublished per curiam opinion, the court rejected this contention and affirmed the district court's findings of fact. The court "refuse[d] to hold that an employer may not offer subjective evaluations in order to rebut a plaintiff's prima facie case," *id.* at A9-A10, reasoning that "many jobs necessarily involve subjective qualities." *Id.* at A10. The court noted that a plaintiff could rebut subjective evaluations through "witness testimony and proof of job experience and other qualifications," *ibid.*, and concluded that petitioner "offered no evidence of intentional discrimination." *Id.* at A11.

ARGUMENT

The decisions of the district court and the court of appeals are correct and do not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

1. Petitioner principally contends (Pet. 5-7) that the evidence showed the IRS's reasons for not promoting him to be pretextual. However, two courts have already soundly rejected this claim, both of them concluding that petitioner had presented no evidence at all of intentional discrimination. See Pet. App. A11, A25. This Court has declined "to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner comes

nowhere near this standard, offering instead simply bald assertions of factual error.[3]

2. Petitioner contends (Pet. 6) that subjective criteria may not be used to rebut a prima facie case of discrimination. The court of appeals correctly rejected this argument, noting that "many jobs necessarily involve subjective [evaluation]." Pet. App. A10. That petitioner established a prima facie case is immaterial, for once the trial is complete, as was the case here, "the *McDonnell-Burdine* presumption [of unlawful discrimination] 'drops from the case.'" *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983), quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.10 (1981). This Court has often reviewed claims of discrimination against employers who distinguished between employees on the basis of subjective evaluation, and has consistently held that the basic inquiry remains whether a plaintiff has borne the burden of "persuading the trier of fact that the defendant intentionally discriminated against [him]." *Burdine*, 450 U.S. at 253. See *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978) (hiring decision based on personal knowledge of candidates and recommendations); *Burdine, supra* (discretionary decision to fire individual who was said not to get along with co-workers); *United States Postal Serv. Bd. of Governors* v. *Aikens, supra* (discretionary promotion decision). See also *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 988-989 (1988). Whatever the form of the IRS's rebuttal evidence, the ultimate burden of persuasion

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[3] As to the October 1981 promotion decision, petitioner asserts only that each of the three members of his evaluation panel gave him an identical numerical ranking and that this cannot be considered coincidental. Pet. 5. With respect to the September 1982 promotion decision, petitioner makes the conclusory assertion that the record contains "ample testimony" in support of his argument that the reasons offered by respondent were a pretext. *Id.* at 6.

fell on petitioner, a burden that—the district court and court of appeals firmly concluded—petitioner completely failed to meet.[4]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also argues (Pet. 7) that the courts below erred by failing to require the IRS to demonstrate a "business necessity" for its promotion decisions. This argument is incorrect, as it confuses the inquiry relevant to a "disparate treatment" case, where a plaintiff claims that he was discriminated against individually, with that relevant to a "disparate impact" case, where a plaintiff claims that a facially neutral employment practice has adverse effects on a protected group. In this case, one of disparate treatment only, see Pet. App. A3-A4, "business necessity" plays no part.

Finally, petitioner alludes (Pet. 5) to an alleged circuit conflict over the standard of causation to be employed in Title VII cases. See *Walsdorf* v. *Board of Comm'rs*, 857 F.2d 1047, 1052 n.1 (5th Cir. 1988). However, not only has this Court resolved that conflict, see *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989), but it is irrelevant here, as petitioner presented no evidence at all of any kind of discrimination. There is therefore no need to address the standard of causation.

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